85-1469

No. 85-

Supreme Court, U.S.
FILED
MAR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

MASSACHUSETTS DEPARTMENT OF EDUCATION
AND DARTMOUTH SCHOOL COMMITTEE,

Petitioners,

v.

DAVID D.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Carl Valvo*
Kim E. Murdock
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 727-1033
(Massachusetts Department
of Education)

James M. Cronin, Esq.
432 County Road, Box H-3102
New Bedford, MA 02740
(617) 996-8291
(Dartmouth School Committee)

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Education of the Handicapped Act (20 U.S.C. §§ 1400 et seq.) incorporates state special education law, such that more stringent state law rather than federal law, as construed in Board of Education v. Rowley, 458 U.S. 176 (1982), determines whether a State is providing a "free appropriate public education" under the federal Act.

2. Whether the Education of the Handicapped Act, by incorporating state special education law, circumvents the Eleventh Amendment's limitation on federal jurisdiction as construed in Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900 (1984), and permits the federal courts to interpret, apply, and enforce state law against the States and state officials.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	3
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	19
I. THE COURT OF APPEALS' HOLDING THAT THE EHA PERMITS THE STATES TO BE SUED IN FEDERAL COURT ON THE BASIS OF STATE LAW RAISES IMPORTANT FEDERAL QUESTIONS WHICH SHOULD BE DECIDED BY THIS COURT.	19
A. The Decision Below Reopens The Question Answered In Rowley And Has A Profound Impact On The Substantive Scope Of The EHA.	21

		Page
B.	The Decision Below Allows The Federal Courts To Displace The States In The Development Of State Educational Policy And The Interpretation Of State Law.	27
C.	The Decision Below Has Important Financial Implications For The States.	34
II.	THE DECISION OF THE COURT OF APPEALS MISAPPREHENDS ROWLEY AND DESTROYS THE UNIFORMITY OF FEDERAL LAW.	37
III.	THE COURT OF APPEALS' RESOLUTION OF THE ELEVENTH AMENDMENT ISSUES IN THIS CASE CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.	44
CONCLUSION		52

TABLE OF AUTHORITIES

Cases	Page
Amherst-Pelham Regional School Committee v. Department of Education, 376 Mass. 480, 381 N.E.2d 922 (1978)	24
Atascadero State Hospital v. Scanlon, 105 S. Ct. 3142 (1985)	passim
Battle v. Pennsylvania, 629 F.2d 269 (3rd Cir. 1980), cert. denied, 452 U.S. 968 (1981)	36
Board of Education v. Rowley, 458 U.S. 176 (1982)	passim
Buchholtz v. Iowa Dept. of Public Instruction, 315 N.W. 2d 789 (Iowa 1982)	26
Burlington School Committee v. Department of Education, 105 S. Ct. 1996 (1985)	27
Cothern v. Mallory, 565 F. Supp. 701 (W.D. Mo. 1983)	22
David D. v. Dartmouth School Committee, 615 F. Supp. 639 (D. Mass. 1984)	15

David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985) — passim

Epperson v. Arkansas, 393 U.S. 97 (1968) — 29

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) — 48

Geis v. Board of Education of Parsippany-Troy Hills, 774 F.2d 575 (3d Cir. 1985) — 22, 32, 45

Isgur v. School Committee of Newton, 9 Mass. App. Ct. 290, 400 N.E.2d 1292 (1980) — 23

Jerome v. United States, 318 U.S. 101 (1943) — 43

Meiner v. Missouri, 673 F.2d 969 (8th Cir. 1981), cert. denied, 459 U.S. 909 (1982) — 48

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) — 44

Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900 (1984). — passim

Quern v. Jordan, 440 U.S. 332 (1979) — 50

San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) 29, 30

Scituate School Committee v. Robert B., 620 F. Supp. 1224 (D.R.I. 1985) 22

Smith v. Robinson, 104 S. Ct. 3457 (1984) 35, 51

Students of California School for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984), vacated 105 S. Ct. 1820 (1985) 32, 45

Students of California School for the Blind v. Honig, 745 F.2d 582 (9th Cir. 1984) 45

Town of Burlington v. Department of Education, 736 F.2d 773 (1st Cir. 1984), aff'd on other grounds, 105 S. Ct. 1996 (1985) 16

Youngberg v. Romeo, 457 U.S. 307 (1982) 32

Statutes

20 U.S.C. §§ 1400 et seq. 3

20 U.S.C. § 1401(16) 4, 39, 40

20 U.S.C. § 1401(17) 4, 39, 40

20 U.S.C. § 1401(18) 4, 38

20 U.S.C. § 1401(18)(B) 17, 41

20 U.S.C. § 1401(19) 12

20 U.S.C. § 1411(d) 35

20 U.S.C. § 1412(1) 9, 21

20 U.S.C. § 1412(6) 42

20 U.S.C. § 1415(b)(1)(E) 10

20 U.S.C. § 1415(b)(2) 10

20 U.S.C. § 1415(e) 10, 14

20 U.S.C. § 1415(e)(2) 4, 51

28 U.S.C. § 1254(1) 3

29 U.S.C. § 794 51

Mass. G.L. c. 71B, §§ 2-3 5

Constitutional Provisions

U.S. Constitution, Amend. XI. 6

U.S. Constitution, Amend. XIV, § 5 6

U.S. Constitution, Article 1, § 8, cl. 1, 6

Regulations

603 C.M.R. Part 28.00, ¶ 502.4 — 10

Miscellaneous

S. Rep. No. 94-168, 94th Cong. 1st Sess., reprinted in 1975 U.S. Code Cong. & Ad. News 1448 — 42

Bator, Mishkin, Shapiro, and Wechsler, The Federal Courts and the Federal System (2d ed. 1973) — 43

No. 85-

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1985

MASSACHUSETTS DEPARTMENT
OF EDUCATION AND
DARTMOUTH SCHOOL COMMITTEE,

Petitioners,

v.

DAVID D.,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The Massachusetts Department of Education and the School Committee of the Town of Dartmouth respectfully petition for a writ of certiorari to review the judgment and opinion of the United States

Court of Appeals for the First Circuit.[1/]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 775 F.2d 411 (1st Cir. 1985). Appendix (A.) 1. A petition for rehearing was denied without opinion. A. 155. The opinion of the United States District Court for the District of Massachusetts is reported at 615 F. Supp. 639 (D. Mass. 1984). A. 63. The administrative decision of the state Bureau of Special Education Appeals, a division of the Massachusetts Department of Education (A. 104), is not reported.

1/ All parties to the appeal in the United States Court of Appeals for the First Circuit are named in the caption.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on October 15, 1985. A timely petition for rehearing and suggestion for rehearing in banc was denied on December 3, 1985, and this petition for certiorari is being filed within 90 days after that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case arises under the Education of the Handicapped Act, 20 U.S.C. §§ 1400 et seq. (hereafter "EHA" or "the Act"), which provides federal financial assistance to participating States for the evaluation and education of handicapped children. The EHA requires participating

States to provide handicapped children with a "free appropriate public education", which the Act defines as

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5) [20 U.S.C. § 1414(a)(5)].

20 U.S.C. § 1401(18). "Special education" and "related services" are defined, respectively, at §§ 1401(16) and (17). A. 158-59. The EHA provides for judicial review of administrative decisions concerning the provision of a "free appropriate public education" in state or federal court. 20 U.S.C. § 1415(e)(2). A. 159-60.

The court below held that the definition of "free appropriate public education" contained in the EHA incorporates relevant state substantive law concerning the provision of special education services. It further interpreted the Massachusetts special education statute to require the "maximum possible development" of handicapped children. See Mass. G.L. c. 71B, §§ 2-3. A. 160-76.[2/]

The Eleventh Amendment to the United States Constitution provides

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

---

2/ The Court of Appeals did not identify the particular provisions of the state statute on which it grounded its holding on the substantive content of state law. Like the EHA itself, the state statute does not specify the standard to be applied by a reviewing court to a disputed educational plan. The petitioners have reproduced in the Appendix sections 2 and 3 of the statute, upon which the district court relied.

> commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Constitution Amend. XI. The Spending Clause, Article 1, § 8, cl. 1, of the Constitution states that "Congress shall have Power To . . . provide for the . . . general Welfare of the United States." Section Five of the Fourteenth Amendment to the Constitution provides "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATEMENT OF THE CASE

1. This case presents the question of whether the Education of the Handicapped Act ("EHA" or "the Act") permits the federal courts to do what Pennhurst State School & Hospital v. Halderman, 104

S. Ct. 900 (1984) (Pennhurst II), teaches they cannot: enforce state law against the States, state agencies, and state officials. The decision below holds that the EHA avoids the proscription of Pennhurst II because it "incorporates" state law and because the Act abrogates the States' Eleventh Amendment immunity. The Court of Appeals thus relied on state law in reversing a state administrative decision concerning the provision of educational services to a handicapped child. Although those services enabled the child to receive educational benefit, which, as Board of Education v. Rowley, 458 U.S. 176 (1982) (Rowley), holds is all that the EHA requires, the court found the child's plan to be inadequate because it did not provide for his "maximum possible development", a requirement based exclu-

sively on a reading of state law disputed by the State's highest educational agency.

Under the scheme created by the EHA, federal money is provided to state and local educational agencies to assist them in educating handicapped children; funding is conditioned upon a State's compliance with specific goals and procedures. Rowley, 458 U.S. at 179 (1982). The Commonwealth of Massachusetts, through its Department of Education (Department), receives such funding, in return for which it has agreed to meet certain substantive and procedural requirements. The principal substantive requirement of the Act is that the States provide all school-age handicapped children within their jurisdiction with a "free appropriate public education." Rowley, 458

U.S. at 180-81, 187; 20 U.S.C. § 1412(1). In Rowley, the phrase "free appropriate public education" was interpreted to mean education "sufficient to confer some educational benefit upon the handicapped child." Rowley, 458 U.S. at 200.

In order to ensure that participating States meet their substantive obligation to provide a free appropriate public education, the Act also imposes extensive procedural safeguards. Parents or guardians of handicapped children must be notified of any proposed change in "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child" and must be permitted to bring a complaint to school au-

thorities with respect to such evaluation and education. 20 U.S.C. § 1415(b)(1)(E). If the parties are dissatisfied with the response of the school authorities, they are entitled to a "due process" hearing before the State educational agency. 20 U.S.C. § 1415(b)(2). Any party aggrieved by the decision of the State agency may file a civil action for judicial review of that decision in state or federal court. 20 U.S.C. § 1415(e)(2).

2. David D., the respondent, is a seventeen year old adolescent with Down's Syndrome. Prior to these proceedings, he lived at home with his parents and attended a "substantially separate" special needs program in a public high school in Dartmouth, Massachusetts. See 603 C.M.R. Part 28.00, ¶ 502.4 (definition of "substantially separate" pro-

gram).[3] That program, in which David had been placed since 1976, provided him with educational benefit, as demonstrated by his steady progress in achieving educational goals. Nevertheless, when Dartmouth proposed to continue that program in 1982, David's parents rejected the town's plan.[4] Instead, David's par-

---

3/ David now attends a 24-hour, year-round program in a residential school for developmentally disabled children, as required by the decisions of the district court and the Court of Appeals. It remains the view of local and state officials that the prior program, with certain modifications proposed during the administrative hearing, should be restored.

4/ The plan, known as an "Individual Education Plan" (IEP), is a written document setting forth for each handicapped child the child's educational performance, instructional goals and objectives, and the specific educational services to be provided. The plan must be prepared at least annually by the local educational authority responsible for the child, in conjunction with teachers,

(footnote continued)

ents requested that he be placed in a more restrictive residential school in order to control certain inappropriate behavior.[5/]

An administrative hearing was held before the state Bureau of Special Education Appeals (BSEA), at which Dartmouth contended that a residential placement was unnecessary, since David was making progress in all areas addressed by his IEP and since he had never displayed the inappropriate behavior which concerned his parents while in school. Dartmouth

---

(footnote continued)

parents, and, where appropriate, the child. 20 U.S.C. § 1401(19).

5/ The EHA requires participating States to educate handicapped children with non-handicapped children whenever possible. Rowley, 458 U.S. at 202. A more restrictive placement is one which is less capable of meeting this "mainstreaming" requirement.

offered, however, to address David's behavioral problems by modifying his IEP to provide for individual and family counseling. The parents argued that only a residential placement would suffice and that even if David was benefiting from his educational plan to the extent required by Rowley, state law imposed a more stringent standard on Dartmouth: that the child's education benefit him to the "maximum extent feasible." The state hearing officer concluded, however, that the modified IEP proposed by Dartmouth was "adequate and appropriate" to meet David's unique needs. A. 145.[6/]

6/ The hearing officer did not specifically address the parents' argument that state law required more of Dartmouth than the EHA, although it is plain that she rejected it, since she ruled that both state and federal requirements were met by the same showing, that David's IEP was "adequate and appropriate."

3. The parents, on David's behalf, appealed the State's decision pursuant to 20 U.S.C. § 1415(e), by filing a civil action in the United States District Court for the District of Massachusetts against the Department (the state educational agency) and the Dartmouth School Committee (the local educational agency). In July, 1984, the case went to trial in the district court. On September 11, 1984, the district court reversed the BSEA decision on the basis of state law, albeit state law which the court deemed to be incorporated into the EHA. The court opined that "Massachusetts law required [the petitioners] to address . . . [David's] special education needs so as to assure his maximum possible development in the least restrictive environment consistent with that goal" and that a

residential placement was necessary "in order to achieve the maximum progress in development in [David's] ability to function as independently as possible". David D. v. Dartmouth School Committee, 615 F. Supp. 639, 646, 647 (D. Mass. 1984). The district court rejected the Department's arguments that the decision of the state hearing officer could only be affirmed, since David was receiving the "educational benefit" which Rowley holds is all that the EHA requires, and since Pennhurst II precluded it from granting relief on the basis of state law.7/ The district court ruled that Rowley was irrelevant in light of what it viewed as more stringent state law,

---

7/ The petitioners also disputed the district court's interpretation of state law as imposing greater requirements than the EHA, as interpreted in Rowley.

and that, because the EHA incorporates the more stringent state law standard, Pennhurst II presented no obstacle. In the court's view, it was enforcing not state law but federal law, which incorporated state law. Id. at 644, n. 2.[8/]

8/ This "incorporation" theory was not wholly the creation of the district court, but was drawn from dicta in Town of Burlington v. Department of Education, 736 F.2d 773, 789 (1st Cir. 1984), aff'd on other grounds, 105 S. Ct. 1996 (1985). The Court of Appeals is incorrect in its assertion that the Department conceded in the Burlington case that the EHA incorporates state substantive law. See David D. v. Dartmouth School Committee, 775 F.2d at 414. That issue was never presented in Burlington: the issue there was whether a federal court may refuse to give any weight to a state agency's ruling that state procedures have been violated. There was no suggestion by the Department that the EHA incorporates state law or that state law may provide a basis for reversing the decision of a state agency.

4. The petitioners appealed and a divided panel of the Court of Appeals for the First Circuit affirmed. The Court of Appeals held: first, that the EHA, by requiring special education services to "meet the standards of the state educational agency", 20 U.S.C. § 1401(18)(B), incorporates the substantive rights authorized by state special education law and that where state law is more stringent, it and not Rowley determines what constitutes a "free appropriate public education"; second, that Congress, in enacting the EHA, was acting pursuant to its powers under Section Five of the Fourteenth Amendment and that the EHA abrogates the States' immunity under the Eleventh Amendment; and third, that Pennhurst II does not preclude the enforcement of state law under the circum-

stances presented, since the EHA incorporates state law.

Judge Torruella dissented. In a short but pointed opinion, he stated:

> "Assuming the validity of circumventing Pennhurst II through the [majority's] 'incorporation by reference' doctrine . . ., this proposition is sustainable only if it meets the high standards established by Atascadero [State Hospital v. Scanlon, 105 S. Ct. 3142 (1985),] for overriding the Eleventh Amendment. Because I believe that the present situation under the [EHA] . . . is indistinguishable from that in Atascadero under the Rehabilitation Act, and because, as in Atascadero, there is lacking unmistakably clear intention in the language of this legislation to submit the Commonwealth of Massachusetts to suit in federal court for violation of its statutes, I dissent.

David D. v. Dartmouth School Committee, 775 F.2d 411, 424-25 (1st Cir. 1985) (footnotes omitted).

A petition for rehearing and suggestion for rehearing in banc filed by the petitioners was denied without opinion on December 3, 1985.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT THE EHA PERMITS THE STATES TO BE SUED IN FEDERAL COURT ON THE BASIS OF STATE LAW RAISES IMPORTANT FEDERAL QUESTIONS WHICH SHOULD BE DECIDED BY THIS COURT.

This case presents issues of undeniable importance, not only to the administration of a major federal statute governing the education of handicapped children, but also to the jurisdiction of the federal courts and the preservation of the constitutionally mandated balance between the States and the National Government. In holding that the substantive heart of the EHA must be defined by reference to state law, the Court of Appeals has profoundly altered the nature of the

States' obligations under the federal statute and reopened a question believed to have been settled by this Court in Board of Education v. Rowley, 458 U.S. 176 (1982) (Rowley). Furthermore, in deciding that the EHA abrogates the States' constitutional immunity under the Eleventh Amendment, thereby permitting the federal courts to enforce state law against the States, a result contrary to Pennhurst State School and Hospital v. Halderman, 104 S. Ct. 900 (1984) (Pennhurst II), the ruling below vastly extends the jurisdiction of the federal courts to the interpretation of state law and the development of local educational policy, two areas traditionally left to the States. Thus, in the name of enforcing rights created only as a matter of state law, the Court of Ap-

peals' decision profoundly distorts our federal system.

A. The Decision Below Reopens The Question Answered In Rowley And Has A Profound Impact On The Substantive Scope Of The EHA.

Apart from the important Eleventh Amendment issues which it raises, the decision below is significant for its drastic impact on the States' substantive obligations under the EHA.[9/] In Rowley, this Court held that the principal

---

9/ All fifty States currently participate in the statutory scheme. The EHA requires States to have in effect a policy which guarantees a "free appropriate public education" to handicapped children. 20 U.S.C. § 1412(1). As in Massachusetts, this "policy" generally is embodied in state statutes and regulations which function as a state counterpart to the EHA. Many of these state counterparts contain language which, as here, could be interpreted as imposing more stringent requirements than the federal

(footnote continued)

source of substantive rights and obligations under the Act is the definition of "free appropriate public education," which it interpreted to mean "personalized instruction . . . with sufficient support services to permit [a] child to benefit from the instruction." Rowley, 458 U.S. at 189. Here, however, the Court of Appeals concluded that the statutory definition of "free appropriate public education" incorporates relevant substantive state law concerning

---

(footnote continued)

Act. See, e.g., Geis v. Board of Education of Parsippany-Troy Hills, 774 F.2d 575, 579 (3d Cir. 1985) (state regulation required services to be planned according to how pupil "could best achieve educational success"); Cothern v. Mallory, 565 F. Supp. 701, 708 (W.D. Mo. 1983) (state statute required services to "maximize the capabilities" of handicapped children); Scituate School Committee v. Robert B., 620 F. Supp. 1224, 1233 (D.R.I. 1985) (state statute required special education "that will best satisfy the needs" of handicapped child).

the provision of special education services. Thus, a State may provide a handicapped child with all that Rowley demands, yet fail to meet the requirements of federal law if state law is determined by a federal court to require more.10/

10/ In this case, the Court of Appeals determined that Massachusetts law requires the "maximum possible development" of handicapped children. 775 F.2d at 423. Although the point is not necessary to the petitioners' position, they disagree with the lower court's interpretation of state law. The precise question of whether state law imposes more stringent requirements than the EHA has never been considered by the Massachusetts courts. At least one intermediate state appellate court decision appears to dictate a result contrary to that reached by the Court of Appeals on the respondent's state law claim, however. See Isgur v. School Committee of Newton, 9 Mass. App. Ct. 290, 299, 400 N.E.2d 1292, 1298 (1980) (if child is receiving educational benefit, he cannot be transferred to more restrictive placement merely because such placement would provide greater benefit). Furthermore, the Department has consistently construed the

(footnote continued)

This construction of the EHA reopens the question of the substantive scope of the Act ostensibly settled in Rowley and virtually ensures relitigation of that question in every State.11/ Since the

---

(footnote continued)

state and federal standards as equivalent, and the state courts have ruled that its construction of the statute is entitled to particular deference. Amherst-Pelham Regional School Committee v. Department of Education, 376 Mass. 480, 491-92, 381 N.E.2d 922, 930 (1978). In any event, petitioners do not invoke the discretionary jurisdiction of this Court to seek a construction of state law.

11/ As Pennhurst II recognizes, allowing the federal courts to entertain state law claims against the States and state officials "does not necessarily foster . . . policies of judicial economy, convenience, and fairness to litigants . . . . " Pennhurst II, 104 S. Ct. at 920 n. 32 (citation and quotation omitted). Here, as in Pennhurst II, the consequences of extending federal jurisdiction to "incorporated" state law include potential misunderstanding of local law, needless conflict with state policy, duplication of effort, delay, and uncertainty. Id.

federal courts cannot interpret state law with finality, under the Court of Appeals' incorporation theory an authoritative ruling on what constitutes a "free appropriate public education" can be rendered only by a State's highest court. See 775 F.2d at 423 n. 8 (federal courts will follow state law standard as set by State's highest court).[12/] Until such an authoritative ruling is obtained in

---

12/ The Court of Appeals' incorporation theory is logically irreconcilable with its acknowledgment that the States and not the federal courts are the ultimate arbiters of the meaning of incorporated state law. Truly "incorporated" state law becomes federal law; state courts therefore cannot speak with finality as to this state qua federal law, although they continue to do so with respect to state law. Incorporation thus presents the possibility of a system which the Supremacy Clause was meant to avoid, in which state and federal courts are empowered to render authoritative yet conflicting rulings on the meaning of the same law, simply because in one context that law is characterized as "federal" while in other context it is not.

each State,[13] doubt and uncertainty will attend the administration of the Act, both as to the scope of the States' substantive obligations and the rights the EHA confers on parents and handicapped children.[14] Such a prospect inevitably detracts from the central objective of the Act, which is to assist

---

13/ To date, the highest court of only one State has decided whether state substantive law differs from the EHA and, if so, in what respects. See Buchholtz v. Iowa Dept. of Public Instruction, 315 N.W. 2d 789, 793 (Iowa 1982).

14/ Furthermore, although the EHA authorizes judicial review in state as well as federal courts, once a favorable reading of state law is obtained in federal court, subsequent litigants will have little incentive to turn to the alternate state forum. Because state courts have no opportunity to review their federal counterparts' constructions of state law, it has been noted that the only certain escape from an erroneous federal decision is the cumbersome route of legislation. Pennhurst II, 104 S. Ct. at 920 n. 32.

the States in the provision of appropriate educational services to handicapped children.15/

B. The Decision Below Allows The Federal Courts To Displace The States In The Development Of State Educational Policy And The Interpretation Of State Law.

Although, as Rowley implicitly recognizes, the meaning of "free appropriate public education" is in itself an impor-

---

15/ As the Court has recently observed, even when Rowley was believed to answer the question reopened here by the Court of Appeals, the EHA was not a model of expeditious dispute resolution. See Burlington School Committee v. Department of Education, 105 S. Ct. 1996, 2003 (1985) (administrative and judicial review process under EHA termed "ponderous"). Litigation is not in itself an evil, of course; Congress expressly provided for a right to judicial review under the Act. 20 U.S.C. § 1415(e). At the same time, in focusing on procedural guarantees, Congress clearly intended that most if not all of what it wished in the way of substance would be resolved short of litigation. Rowley, 458 U.S. at 206.

tant federal question worthy of review by this Court, this case involves more than an issue of statutory interpretation. The Court of Appeals recognized that the inquiry is not simply whether the EHA incorporates state law, but more importantly, whether incorporation in these circumstances is permissible under Eleventh Amendment doctrine. 775 F.2d at 420. The court answered the question by holding that Congress, in enacting the EHA, was acting pursuant to its powers under Section Five of the Fourteenth Amendment and intended to abrogate the States' Eleventh Amendment immunity, at least with respect to the enforcement of state law in federal court. 775 F.2d at 421. The effects of this holding are as serious as the decision itself is wrong.

Both the development of appropriate

state educational policy and the interpretation and implementation of state law are matters of historic and vital concern to the States.[16/] The EHA itself expresses a congressional judgment that, while there is a federal interest in ensuring that handicapped children have equal access to education, that interest must be protected in ways which will not unduly interfere with the legitimate activities of the States. "Congress' intention was not that the Act

---

16/ See San Antonio School District v. Rodriguez, 411 U.S. 1, 44 (1973) ("difficult to imagine a case having greater impact on our federal system" than one involving federal abrogation of State's method of financing public education); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("[b]y and large, public education in our nation is committed to the control of state and local authorities"); Pennhurst II, 104 S. Ct. at 911 ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law").

displace the primacy of the States in the field of education, but that the States receive funds to assist them in extending their educational systems to the handicapped." Rowley, 458 U.S. at 208. In contrast, the decision below invites, indeed requires, the federal courts to become involved in the interpretation of state law, for the express purpose of second-guessing state administrators concerning appropriate educational methods.[17/] While this is done

---

17/ In enacting the EHA, Congress shared the view of this Court that courts in general "lack the specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." Rowley, 458 U.S. at 206, quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. at 42. For this reason, the standard of judicial review endorsed in Rowley emphasizes deference to the States' decisions under the EHA. In contrast, the standard adopted by the Court of Appeals involves precisely the kind of judicial intervention which Rowley rejects.

in the guise of protecting federal rights, it must be stressed that the sole source of those rights is state, not federal, law.

The impact of this judicial intrusion cuts across all levels of state government. Most immediately, it disrupts the efforts of state and local officials responsible for administering state law and providing educational services to handicapped children. The problem is compounded by the often ephemeral nature of a federal court's construction of state law; state officials cannot know with certainty whether the state law "rights" discovered by a federal court on one occasion will be rejected by a state court on the next.[18/] Further-

---

18/ Although this case focuses on whether a State's substantive standard

(footnote continued)

more, since it involves judicial review of the "presumptively valid" judgments of professionals, Youngberg v. Romeo, 457 U.S. 307, 323 (1982), the ultimate decision courts are called upon to make under the EHA whether a child's education

---

(footnote continued)

for evaluating special education services may be enforced in federal court, the Court of Appeals indicated that, in its view, all substantive and procedural law pertaining to special education is incorporated into the EHA. 775 F.2d at 416, 419-20. The Third Circuit agrees that the EHA incorporates, at a minimum, state substantive law, whether created by statute or regulation. Geis v. Bd. of Ed. Parsippany-Troy Hills, 774 F.2d 575 (3rd Cir. 1985). The Ninth Circuit has taken this "incorporation" theory one step further, holding that the EHA incorporates all state law pertaining to education generally. Students of Calif. School for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984), vacated 105 S. Ct. 1820 (1985). Thus, under the incorporation theory adopted to date by three circuit courts of appeals, the door is open for federal oversight and control of a myriad of purely local matters of educational policy and procedure.

is "appropriate" calls for particular deference to the views of state and local officials. Rowley, 458 U.S. at 208. As this case demonstrates, in the context of interpreting state statutes, federal courts may be less sensitive to the judgments of state officials and more inclined to substitute their own views as to what constitutes appropriate educational planning for handicapped children.

The authority of state courts is also displaced if state law is permitted to provide a basis for relief in federal court. While state courts are equally capable of hearing EHA claims,[19/] the federal courts, less familiar with state law and immune from review by the States'

19/ See Atascadero State Hospital v. Scanlon, 105 S. Ct. 3142, 3146 n. 2 (1985) ("it denigrates the judges who serve on the state courts to suggest that they will not enforce the Supreme law of the land").

highest courts, are perhaps less constrained by state law precedent, or the lack thereof, in attacking difficult state law questions.[20] If the federal courts are permitted to assume an equal role with state courts in the enforcement of state special education law, state courts may become increasingly superfluous in this area.[21]

C. The Decision Below Has Important Financial Implications For The States.

Finally, the Court of Appeals' decision has significant practical implica-

---

20/ Furthermore, in this case the Court of Appeals granted no deference to state officials' construction of state law, despite the fact that the State's highest court has held that such deference is required. See footnote 9, supra.

21/ As previously noted, once a federal court has favorably interpreted state law, satisfied litigants are unlikely to seek or tolerate review in state court, where the issue must be decided anew.

tions for the public fisc, a matter of no small concern to Congress when it enacted the EHA. See Smith v. Robinson, 104 S. Ct. 3457, 3468 (1984) (EHA was an attempt to relieve fiscal burden placed on States and localities by responsibility to provide education for all handicapped children). Under the statutory scheme, the amount of federal funding allotted to each participating State is based upon the number of handicapped children in that State receiving services - not upon the nature of the services provided. 20 U.S.C. § 1411(d). Thus, whether Massachusetts must educate its handicapped children in order to simply "benefit" them, or whether it must instead "maximize their development", as the Court of Appeals has ruled, the federal financial contribution remains fixed.

"[T]he decision to establish educational objectives for handicapped children profoundly impacts the allocation of scarce educational resources." Battle v. Pennsylvania, 629 F.2d 269, 278 (3rd Cir. 1980), cert. denied, 452 U.S. 968 (1981). A State may, of course, choose to expend those resources on maximizing the development of its handicapped children, with no expectation of federal assistance. In this case, however, that choice has not been made by state officials but by a federal court. The result is the diversion of state resources from other purposes, most obviously the education of nonhandicapped children,[22/] with no corresponding assistance from the federal government. Such an outcome

---

22/ Nonhandicapped children do not, of course, possess an enforceable federal right to an education that maximizes their educational development.

is patently inconsistent with Congress' intention to assist the States in educating handicapped children, and its reasoned belief that decisions as to resource allocation, like determinations of educational policy, must be left to the States. See Rowley, 458 U.S. at 209 (Congress' intention was not that Act displace primacy of States in field of education, but that States receive funds to assist them in extending education to handicapped). Certainly such decisions were not intended to be made by the federal courts.

II. THE DECISION OF THE COURT OF APPEALS MISAPPREHENDS ROWLEY AND DESTROYS THE UNIFORMITY OF FEDERAL LAW.

The heart of the Court of Appeals' decision is its analysis of the statutory definition of "free appropriate public

education", which generated its theory that state law is incorporated into the EHA. That analysis is seriously skewed, however, by the court's erroneous reading of Rowley.

In Rowley, this Court devoted considerable attention to the nature of the substantive standard to be applied by the courts in determining whether a handicapped child has been provided with a "free appropriate public education." The term itself is defined in § 1401(18) of the Act as "special education and related services" which must also meet certain comparatively straightforward requirements, set forth in subsections (A) through (D) of the definitional section. 20 U.S.C. § 1401(18). Paraphrasing the definitions of "special education" and "related services" set forth at

§§ 1401(16) and (17), this Court held that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education', as defined by the Act." Rowley, 458 U.S. at 189.

The decision below seizes upon Rowley's reference to the "definitional checklist" of subsections (A) through (D) with startling results. In the lower court's view, subsection (B), which requires special education services to "meet the standards of the state educational agency," incorporates the entire corpus of state special education law, which in this case it decided requires the "maximum possible development" of handicapped children. The result is the

complete displacement of the substantive standard for determining whether special education services are "appropriate" derived from §§ 1401(16) and (17) and endorsed in Rowley. In its stead is substituted a far more demanding standard, ostensibly derived from state law.[23/] This Court could hardly have intended

---

23/ The state law standard approved by the Court of Appeals bears a remarkable similarity to the standard rejected by this Court in Rowley. See Rowley, 458 U.S. at 189-90, 198 (lower courts found that EHA requires states to maximize potential of handicapped children; Court finds no support for such a standard).

The petitioners repeat that they believe that the Court of Appeals' construction of state law is incorrect. Since their argument is that the federal courts lack jurisdiction to even consider the state law question, however, they have not suggested that the question be certified to the State's highest court. Such action would be appropriate only were the Court to conclude that the EHA incorporates state law and that there is no Eleventh Amendment bar to such incorporation.

that its holding in Rowley be reduced to an irrelevance, or at best an academic footnote. Yet this is the precise outcome of the undue emphasis placed by the Court of Appeals on subsection (B) of the statute.

In the petitioners' view, the Court of Appeals' interpretation of subsection (B) is simply wrong. There is not a single reference in the EHA, its implementing regulations, or the legislative history to the notion that the statute "incorporates" state law.[24/] In making the federal right to a "free appropriate

---

24/ The petitioners suggest that, like the other subsections which make up the "definitional checklist," subsection (B) imposes a straightforward and easily ascertained requirement: that in each participating State, a single state agency must assume ultimate responsibility for the education of handicapped children.

(footnote continued)

public education" dependent on the law of each State, the Court of Appeals has transformed that right into a national crazy quilt of differing requirements. The court's decision fails to recognize that, while the States are free under the EHA to confer greater rights on their handicapped residents than those provided by the Act, there is no federal interest in the enforcement of such state-created rights. Pennhurst II, 104 S. Ct. at 911.

In contrast, there is a strong federal interest in the uniform application of federal law, which the Court of Ap-

---

(footnote continued)

The importance of vesting such responsibility in a single state agency is emphasized in the legislative history and elsewhere in the Act itself. See S. Rep. No. 94-168, 94th Cong. 1st Sess., reprinted in 1975 U.S. Code Cong. & Ad. News 1448 (establishment of single state agency responsibility of "paramount importance"); 20 U.S.C. § 1412(6).

peals has ignored. Jerome v. United States, 318 U.S. 101, 104 (1943); Bator, Mishkin, Shapiro, and Wechsler, The Federal Courts and the Federal System (2d Ed. 1973) pp. 491-93.[25/] Treating all handicapped children equally under the EHA, regardless of the State in which they reside, advances this federal interest. It is also consistent, as the Court of Appeals' construction is not, with Congress' intent to provide handicapped children with access to a free public education, while leaving the substance of such education primarily a matter for the States. Rowley, 458 U.S. at 200, 207.

25/ Because of this federal uniformity interest, even when issues pertaining to state sovereignty and federalism are not present, it is generally not assumed, in the absence of a plain intention to the contrary, that Congress has made the application of a federal statute dependent on state law. Id. No such "plain intention" is present here.

III. THE COURT OF APPEALS' RESOLUTION OF THE ELEVENTH AMENDMENT ISSUES IN THIS CASE CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

This Court, in a recent line of cases, has stressed the fundamental importance of the States' constitutional immunity and the vital role it plays in our federal system. See, e.g., Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) (Pennhurst I); Rowley, 458 U.S. at 204 n. 26 (1982); Pennhurst II, 104 S. Ct. 900 (1984); Atascadero State Hospital v. Scanlon, 105 S. Ct. 3142 (1985) (Atascadero). In its approach to and treatment of this issue, the decision below "reflects an insensitivity to the most recent relevant pronouncements [of the Court] and to the principles of federalism those pronouncements sought to explicate." Students of California

School for the Blind v. Honig, 745 F.2d 582, 586 (9th Cir. 1984) (dissenting from failure to consider in banc).[26/] This insensitivity is particularly evident in the Court of Appeals' discussion of Pennhurst II and its superficial treatment of Atascadero.

It must be emphasized that the "incorporation" theory on which the lower court relied, which holds that the EHA federalizes the substantive and procedural requirements of state special edu-

---

26/ As noted earlier, both the Ninth Circuit, in Honig, and the Third Circuit, in Geis, have reached the same result on the incorporation issue as that arrived at by the First Circuit in this case. In Honig, this Court granted certiorari but vacated on mootness grounds. 105 S. Ct. 1820 (1985). (Three justices, commenting on the complexity of the case, dissented from the disposition. Id. at 1821.) The state regulation at issue in Geis was subsequently repealed. Geis v. Board of Education of Parsippany-Troy Hills, 774 F.2d at 582 n. 3. No other Court of Appeals has addressed the issue.

cation law, permits a result indistinguishable from that proscribed by Pennhurst II. That is, it permits suits by individuals in federal court for the enforcement of state law against the States and state officials. As the Court observed in Pennhurst II, "[s]uch a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." Pennhurst II, 104 S. Ct. at 911.

Although Pennhurst II was decided in the context of a pendent state law claim, the conflict with Eleventh Amendment principles is no less significant when a federal court assumes jurisdiction over "incorporated" state law.27/ As Part I

27/ Although, as the Court of Appeals noted, federal incorporation of state law is not without precedent, none of

(footnote continued)

of the petitioners' discussion demonstrates, most if not all of the difficulties associated with federal intrusion on state sovereignty persist. Thus, even if Congress intended the EHA to incorporate state law (a proposition that is highly unlikely, given the absence of any language in the Act or its legislative history expressing such a desire), the Court of Appeals' dismissal of Pennhurst II as relevant only to pendent jurisdiction fails to recognize any of the concerns which animate the Eleventh Amendment and its application to federal judicial enforcement of state law.

(footnote continued)

the decisions it cites concerns enforcement of such incorporated law against a State. Furthermore, none involves the complete displacement by state law of existing standards contained in a federal statute. See 775 F.2d at 419 n. 6.

Apart from its discussion of Pennhurst II, the Court of Appeals also concluded that the EHA abrogates the States' Eleventh Amendment immunity from federal adjudication of state law claims.[28/] It is undisputed that Congress may abrogate the States' Eleventh Amendment immunity when acting pursuant to Section Five of the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).[29/] In Atascadero, this

---

28/ In contrast, the Eighth Circuit has held that the EHA does not abrogate the Eleventh Amendment immunity of the States. Meiner v. Missouri, 673 F.2d 969, 981 (8th Cir. 1981), cert. denied, 459 U.S. 909 (1982). Thus, an additional reason for granting certiorari in this case is to resolve this conflict between the circuits.

29/ The petitioners argued below that the EHA was not a Fourteenth Amendment statute, but was instead an exercise of Congress' powers under the Spending Clause. See Rowley, 458 U.S. at 190 n. 11, 204 n. 26 (1982) (discussion of EHA

(footnote continued)

Court held that because of the "vital role of the doctrine of sovereign immunity in our federal system," Pennhurst II, 104 S. Ct. at 907, Congress may effect this result only by "unmistakable language in the statute itself." Atascadero, 105 S. Ct. at 3148 (1985). Although the Court of Appeals purported to follow Atascadero, in fact, as the

---

(footnote continued)

as Spending Power legislation). As such, the question is not whether Congress has abrogated the States' immunity, but rather whether they have been clearly and unequivocally informed that, as a condition of participation in the EHA, they must waive their Eleventh Amendment immunity. See Atascadero, 105 S. Ct. at 3145 (discussion of waiver and abrogation). In either case, a clear and unequivocal indication of the surrender of Eleventh Amendment rights, as well as a clear statement of the conditions of participation imposed upon the States, is required. Id. at 3150. See also Pennhurst I, 451 U.S. at 17 (any conditions of State's participation in legislative scheme under Spending Power must be clearly and unambiguously expressed in order to be effective).

dissent recognized, it relied on precisely the type of general statutory language and vague legislative history which Atascadero holds is inadequate to prove abrogation. 775 F.2d at 425 (Torruella, J., dissenting).30/

More specifically, the court's conclusion that the EHA abrogates the States' Eleventh Amendment immunity relies on the statutory definition of a "free appropriate public education", 20 U.S.C. § 1401(18), termed "cryptic" by this Court in Rowley, and the fact that the Act authorizes "any party aggrieved by the findings and decision" of a state

---

30/ Most of the court's discussion of the issue is devoted to demonstrating the equal protection underpinnings of the EHA. 775 F.2d at 420. The mere fact that a federal statute was enacted pursuant to Congress' powers under Section Five does not establish that Congress has abrogated the States' Eleventh Amendment immunity, however. Quern v. Jordan, 440 U.S. 332, 345 (1979).

educational agency concerning a child's "free appropriate public education" to bring a civil action in federal or state court. 20 U.S.C. § 1415(e)(2). 775 F.2d at 421-22. Neither vague definitional language nor "a general authorization for suit in federal court is . . . the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." Atascadero, 105 S. Ct. at 3149. As the dissent recognized below, Atascadero and this case are indistinguishable.[31/] The decision of the Court of Appeals therefore conflicts with this Court's decision in Atascadero.

31/ Atascadero concerned § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, rather than the EHA. The two statutes are closely related, however, and have a similar substantive content with respect to the education of handicapped children. Smith v. Robinson, 104 S. Ct. at 3472.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the opinion and order of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Carl Valvo*
Kim E. Murdock
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 727-1033
(Massachusetts Department
of Education)

James M. Cronin, Esq.
432 County Road, Box H-3102
New Bedford, MA 02740
(617) 996-8291
(Dartmouth School Committee)

*Counsel of Record